HOTEL CONTINENTAL SDN BHD

v.

CHEONG FATT TZE MANSION SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: P-02-337-96]
5 JULY 2002

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Appeal against refusal to set aside - Whether there was material non-disclosure by plaintiff - Whether essential justice of case outweighed sufficiency of plaintiff's undertaking on damages - Whether there were serious questions to be tried - Balance of convenience and justice - Whether damages would be an adequate remedy - Piling works allegedly causing cracks in adjacent building - Whether plaintiff has made out prima facie case of actionable nuisance against defendant*

The plaintiff (the registered proprietor of a historical building known as the Cheong Fatt Tze Mansion) applied for and obtained an *ex parte* injunction restraining the defendant (the proprietor of the adjacent Continental Hotel) from continuing with its hammer-piling works on the hotel grounds which were alleged to have caused cracks and structural damage to the mansion. Subsequently, upon hearing the plaintiff's *inter partes* application for the interlocutory injunction and the defendant's application to set aside the same, the learned judge allowed the former application and dismissed the latter one. This was the defendant's appeal from the decision of the learned judge.

Held:
Per Alauddin Mohd Sheriff JCA

[1] The learned judge was right in holding that there was no material non-disclosure in respect of the plaintiff's application for the interlocutory injunction and that the plaintiff had shown a sufficiently clear nexus between the defendant's hammer-piling works and the fresh cracks appearing in the mansion. On the evidence, he was justified in holding that unless an alternative piling system was adopted the safety and structural integrity of the mansion would be compromised. The learned judge was correct in deciding that the essential justice of the case outweighed the issues concerning the plaintiff's undertaking as to

damages. He was also correct in his finding that not only were there serious questions to be tried but that the plaintiff had made out a *prima facie* case for an actionable nuisance against the defendant. The fact that the defendant had taken all reasonable steps to avert the nuisance or that its hammer-piling works were transient did not defeat the plaintiff's right to an injunction. As was found by the learned judge, the balance of convenience and of justice was in the plaintiff's favour and damages could not possibly be an adequate remedy considering that the mansion was a national heritage. (pp 658 h, 662 f, h-i & 663 a-c)

[Defendant's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif (pemilik berdaftar bangunan bersejarah yang dikenali sebagai Mansion Cheong Fatt Tze) memohon dan memperolehi suatu injunksi *ex parte* menghalang defendan (pemilik Hotel Continental bersebelahan) dari meneruskan kerja-kerja penanaman cerucuk besi di halaman hotelnya yang dikatakan menyebabkan keretakan dan kerosakan struktur kepada mansion. Berikutnya, sewaktu mendengar permohonan *inter parte* plaintif untuk injunksi interlokutori serta permohonan defendan untuk mengenepikan injunksi, yang arif hakim telah membenarkan permohonan plaintif dan menolak permohonan defendan. Defendan merayu terhadap keputusan yang arif hakim.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Yang arif hakim adalah betul bilamana memutuskan bahawa tidak berlaku kegagalan pendedahan yang material berhubung permohonan plaintif untuk injunksi interlokutori dan bahawa plaintif telah membuktikan kaitan yang jelas di antara keretakan-keretakan baru yang berlaku pada mansion dengan kerja-kerja penanaman cerucuk besi oleh defendan. Berdasarkan keterangan, terdapat justifikasi bagi dapatan beliau bahawa keselamatan dan kemantapan struktur mansion akan terjejas, kecuali suatu sistem alternatif bagi penanaman cerucuk dicari dan digunakan. Yang arif hakim juga betul bila mendapati bahawa imbangan keadilan kes mengatasi isu-isu akujanji plaintif berkenaan gantirugi. Begitu juga dengan keputusan beliau bahawa bukan sahaja wujud persoalan-persoalan penting untuk dibicarakan, tetapi suatu kes *prima facie* kacau ganggu telah dibuktikan terhadap defendan. Fakta bahawa defendan telah mengambil langkah-langkah munasabah bagi menghindar gangguan, dan bahawa kerja-kerja penanaman cerucuk besi tersebut dilakukan secara sementara sahaja tidak boleh menghalang plaintif dari mendapatkan perintah injunksi. Sepertimana yang diputuskan oleh

yang arif hakim, imbangan keselesaan dan keadilan menyebelahi plaintif dan gantirugi tidak mungkin menjadi remedi yang memadai, mengambilkira bahawa mansion adalah pusaka negara.

[Rayuan defendan ditolak.]

Case(s) referred to:
Allen v. Jambo Holdings Ltd [1980] 2 All ER 502 ***(refd)***
American Cyanamid Co v. Ethicon Ltd [1975] 1 Al ER 504 ***(foll)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Pg) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(refd)***
Rapier v. London Tranways Company [1893] 2 Cl 588 ***(refd)***
Stone v. Bolton [1950] 1 KB 201 ***(refd)***

For the appellant - Tan Beng Hong (Ooi Teik Hoe); M/s Ooi Lee & Co
For the respondent - JA Yeoh; M/s Shearn Delamore & Co

[Appeal from High Court, Pulau Pinang; Suit No: 22-97-1996]

Reported by Gan Peng Chiang

JUDGMENT

Alauddin Mohd Sheriff JCA:
On 29 March 1996 the respondents obtained an *ex parte* order of injunction from the High Court, Penang. Since the *ex parte* injunction order was good for only two weeks the respondents, by way of summons-in-chambers dated 5 April 1996 (encl. 7) applied *inter partes* for an interlocutory injunction to restrain the appellants from causing or permitting piling and/or related building works to continue on the appellants' site and/or causing or permitting to continue any vibration or nuisance of a like kind pending the determination of an alternative system of piling.

Three days later ie, on 8 April 1996 the appellants filed an application under encl. 13 to set aside the *ex parte* injunction order dated 29 March 1996.

The learned judge heard both encls. 7 and 13 together. At the end of the hearing ie, on 15 May 1996 he granted an order for an injunction as prayed for by the respondents in encl. 7 and dismissed the appellants' application under encl. 13.

The appellants now appeal to us against the whole of the decision of the learned judge given on 15 May 1996.

For a summary of the background facts to this appeal we cannot improve upon that provided by the learned judge in his judgment appearing at pp. 81 to 83 of Volume 1A of the Appeal Record. The summary is as follows:

(1) The respondents, a private limited company incorporated in Malaysia were at all material times the registered proprietor and occupier of the property known as Holdings No 21 and 22, Town Subdivision 19, North East District, Penang, on which stands the premises commonly known as Cheong Fatt Tze Mansion (the Mansion).

(2) The appellants were the registered proprietor of an adjacent land known as Holding No. 23, Town Subdivision 19, North East District, Penang on which the Hotel Continental (the Hotel) is situated.

(3) At the material time the appellants were in the process of building a 20-storey extension to the Hotel on the small portion of their said property at the back of the Hotel (the extension site).

(4) This extension site faces the back portion of the Mansion, separated only by an eighteen (18) feet wide service road.

(5) The appellants commenced building works on the extension site on or about 18.3.96 and had caused piling works to be carried out by means of hydraulic piling system. The system employed involves hammering pre-stressed or preformed large displacement concrete piles into the ground.

(6) The respondent's case is that they had purchased the Mansion about four years ago (prior to this incident) at the approximate price of RM2.75 million and they later expended a further sum of about RM3 million for the purpose of restoration works including preserving and conserving the features and fabric and tapestry of the building to its original state.

(7) In their affidavits the respondents claim that in order to restore the mansion as a heritage building, considerable time, effort and expense had to be expended in engaging expert craftsmen from China to supervise the restoration works which included intricate and delicate porcelain tapestry works.

(8) By virtue of the appellants' continuous piling works, the respondents claim that severe cracks have appeared on the walls of the Mansion due directly to the excessive vibrations created by such method of piling employed.

(9) It is imperative that unless an alternative system of piling is adopted to avert such vibrations or pressures on the Mansion the very safety and structural stability of the Mansion would be endangered, considering the age and foundation of the building and other features peculiar to buildings of that era.

(10) Although the respondents have approached the appellants to cease the said piling works pending the adoption of an alternative piling system to avert vibrations and to avoid any damage to the Mansion the appellants have refused to heed the respondent's request. The respondents were left with no choice but to apply for the said injunction.

Before us the learned judge's decision was attacked on the following grounds:

(1) The learned judge erred in law and in fact in granting to the respondents the *ex parte* injunction against the appellants and or their servants from continuing with the piling work and, further, in dismissing the appellants' application to set aside the *ex parte* injunction. In holding so, the learned judge failed to consider that there was no material before him to justify granting of the *ex parte* injunction.

(2) In granting the above injunction and in dismissing the appellants' application, the learned judge erred in law and in fact in holding that there were no non-disclosure of material facts by the respondents in their application for the said injunction.

(3) The learned judge erred in fact in finding that the cracks appearing on the respondent's building were severe cracks and structural in nature while there was no evidence to support such a finding.

(4) The learned judge erred in law and in fact in assuming and holding that unless an alternative system of piling be adopted, the safety and structural stability of the respondents' building would be endangered.

(5) The learned judge erred in law and in fact in holding that the sufficiency of the respondents' undertaking as to damages in regard to the injunction was not a factor or a factor of less weight to be given, in deciding on whether the injunction should be issued or continued.

(6) The learned judge erred in law and in fact by concluding that there were serious issues to be decided at the trial.

(7) The learned judge erred in law and in fact when he decided the balance of convenience lies in favour of the respondents.

Before proceeding to consider the above grounds of appeal we feel it is pertinent at this stage to refer to and remind ourselves of the principles governing the granting of injunction as laid out in the most celebrated case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504 upon which the learned judge also relied when considering the applications before him.

As stated in that case an injunction is a discretionary remedy, but the discretion should be exercised in accordance with the following principles ie,

1. Whether the plaintiff has a cause of action in which there are serious questions to be tried. Though, in this regard it is not strictly necessary to require the plaintiff to succeed in establishing a *prima facie* case or the probability that he will be successful at the trial of this action.

2. Whether if the plaintiff were to succeed at the trial he could be adequately compensated by the award of damages.

3. Whether the defendant would be adequately compensated under the plaintiff's undertaking.

4. Whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction.

We shall now deal with the first three grounds advanced by the appellants.

After careful reading of the affidavit of Tan Chong Kheng affirmed on 29 March 1996 in support of the *ex parte* injunction (encl. 2), the affidavit of Tan Chong Kheng affirmed on 5 April 1996 (encl. 6) in support of the *inter partes* injunction, the opposing affidavits (encls. 11, 12 & 14) in the application to set aside and the affidavit in reply dated 20 April 1996 (encl. 17), the learned judge found that there was no material non-disclosure on the part of the respondents when they sought the *ex parte* order. Further the learned judge was fully satisfied that even in their initial affidavit and the report of their engineer the respondents had sufficiently shown a clear nexus between the appellants' piling works and the cracks in the Mansion.

As a matter of fact the respondents' application for both an *ex parte* injunction and the *inter partes* injunction was grounded on their complaint over the various cracks in the Mansion arising from the piling works carried out by the appellants. The learned judge found that the relevant cracks upon which the *ex parte* application was made were obviously fresh ones, serious in nature and bearing no fungus or dirt marks. This view of the learned judge is supported by the finding in the report dated 5 April 1996 prepared by the respondents' consultant engineer Mr. Yap Ching Chan. In his report at para 2.0 Mr. Yap had categorically stated that "it is obvious that the piling works which commenced on or about 18 March 1996 have resulted in these cracks appearing on parts of the Mansion nearest to the piling site". Mr. Yap also said that there were numerous severe cracks which were fresh cracks with no fungus growth or stain marks. He further said that such severe cracks could in all probability result in the safety and the integrity of the premises being severely compromised.

Although the appellants had with the aid of several photos sought to show certain other cracks found in the Mansion which were not caused by their piling operations the learned judge found that those were not the cracks in respect of which the respondents had founded their application for the injunction, but rather old cracks (projected by the appellants for consideration) which appear to be superficial cracks with dirt marks and traces of fungus that occur in old buildings.

Without being unjust to the appellants the learned judge also referred to exh. LLC7 of encl. 11 which were reports dated 21 March 1996 and 28 March 1996 prepared by the appellants' engineer. In those reports it was not denied that the cracks were fresh cracks. Instead the engineer undertook on behalf of the appellants to make good any damage that may result from the piling works and stated that the appellants have bought a comprehensive insurance policy to cover damage to adjacent properties. By this the learned judge said that the appellants had implicitly acknowledged that the cracks were fresh cracks.

There seems to us to be a conflict in expert evidence here. This fact is also recognised by the learned judge. In considering this issue in his judgment this is what the learned judge said:

> As there is a conflict in expert evidence, the court's approach in evaluating such conflicting evidence – besides evaluation of credibility – is not only to examine the scientific grounds and basis on which they rely (see *Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte. Ltd. and Eugene H.L. Chan Associated (Third Party)* [1984] 2 MLJ 202) but also in my view, if one of the experts is involved in the impugned works (as here), the court may examine the manner in which he had implemented the proposed works as an engineer.

It is common ground that the engineer Mr. Loh had made no examination of the soil in the extension site but had rather adopted the soil investigation of the piece of land adjacent to the Hotel.

This court is unable to accept how Mr. Loh could comment and least of all vouch for the safety of the Mansion when he had not even caused the essential pre-requisite procedure of a soil investigation to be carried out before designing the foundations of a twenty-storey structure and before proceeding with the piling works ...

The importance of soil investigation report is far too crucial to be ignored particularly when the defendants' engineer has acknowledged that 'Penang Island is notorious for its land settlement problems as evidenced by the foundation settlement on the infamous Northam Court ... It is equally disturbing that the defendants' engineer had not submitted their earthworks plans for the approval of the Majlis Perbandaran Pulau Pinang until 26.4.96 in the midst of the proceedings herein.

Furthermore, under by-law 7 of the Penang Island Earthworks By-Laws 1975, unless exempted by the Local Government Board Management, a developer (the Defendants here) is required to submit *inter alia* not only a method of protective piling but also precautions taken to protect the adjoining lands, buildings, roads and other properties. Thus, it is no surprise then that in the instant case the local authority has exercised their powers under Section 70A (4) to order (*vide* their letters to the Defendants dated 1.4.96 and 10.4.96 (exhibits TCK 3 and TCK 4 of Enclosure 17) the immediate cessation of the Defendants' piling works.

Having studied the reports by both engineers and made his comments abovementioned the learned judge concluded and made the following findings:

> For all the above reasons, I find the professional views of engineer Mr. Yap the more credible of the two experts' evidence and I also accept his professional opinion that the crux of the complaint is not merely a matter of cracks hitherto caused, but more importantly, that the foundation and building structure of the Mansion would be seriously weakened, destabilized and made unfit for human habitation should the piling works continue. On the other hand after having studied the various affidavits and reports of the engineer Mr. Loh, I find that his opinion in this regard is neither professional nor objective and should be read with caution and circumspection. In this regard, I also note with regret that the Plaintiffs suggestion (as reflected by the very wording of the injunction prayed) that an independent engineer be appointed to evaluate the situation did not find favour with the Defendants.

Having the advantage of all documentary evidence available before him and coupled with all the reasons he had already enumerated above we are of the view that the learned judge had made strong and correct findings of facts with which we agree and find little or no room to interfere.

With the greatest of respect to the learned counsel for the appellants we find that his submission that there was no material before the learned judge to justify granting of the injunction is extremely unfounded.

His complaint about non-disclosure of material facts by the respondents in their application for the injunction is also baseless and without merits.

On the fourth ground of appeal we find that based on the available evidence before him the learned judge is justified in assuming and holding that unless an alternative system of piling be adopted the safety and structural stability of the respondents' building would be endangered.

The learned judges' reasons for the above assumption can be found in the following passage in his judgment appearing at pp. 101 & 102 of the Appeal Record as follows:

> Surely, after revelation of the above professional inadequacies on the part of the Defendants' engineer, and this court being satisfied that the cracks in the Mansion complained of were fresh cracks caused by the piling, and having also, from the evidence available at this stage of the proceedings, accepted the Plaintiffs' consultant engineer's report that the building has been put to a real probability of severe damage, the said piling works ought not to be allowed to continue in the manner hitherto carried out; a *fortiori*, as precautionary measures purportedly adopted by the Defendants to avert the vibrations have apparently failed to avert the cracks caused to the Mansion and also considering that 70% of the piling works remains to be completed. Although the Majlis Perbandaran Pulau Pinang stop-work notice served on the Defendants coupled with their complaint that the Defendants had not furnished them with the earthworks plan, do not in any manner pose any restraint on this Court's unfettered discretion here, yet the prompt action taken by the said City Council only goes to fortify this Court's view that the Defendants should not be allowed to continue their piling operations until a safer method could be employed.

Coming now to the fifth ground it is the contention of the appellant that the learned judge erred in law and in fact in holding that the sufficiency of the respondent's undertaking as to damages in regard to the injunction was not a factor or a factor of less weight to be given in deciding on whether the injunction should be issued or continued.

Although an undertaking by a plaintiff ought to be given on every interlocutory injunction, the learned judge was of the view that when deliberating whether to grant an interlocutory injunction, the essential justice of the case rather than the plaintiffs' financial means ought to be the court's pre-eminent concern.

This view of the learned judge finds support in the decision of Edgar Joseph Jr. J (as he then was) in *Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Ors.* [1988] 3 MLJ 90, which adopted the approach taken by the Court of Appeal in *Allen v. Jambo Holdings Ltd.* [1980] 2 All ER 502.

Edgar Joseph Jr. J had this to say:

> I must next deal with, the sufficiency of the plaintiff's undertaking as to damages. It is true that an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction, though not where the order is in the nature of a final order: ...
>
> This requirement applies even if the plaintiff has no assets and is legally aided: *Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502 ...
>
> In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value.

The learned judge having considered the substantial worth of the plaintiff's property and the considerable value-added restoration works carried out as aforesaid on the Mansion saw no reason to question the sufficiency of the plaintiffs' undertaking as to damages. The learned judge said that in any event, the essential justice presented by the facts here demands that this issue be held in favour of the plaintiff. As for us, we find that the learned judge is perfectly entitled to come to that finding based on the evidence.

On the next issue, learned counsel for the appellant submitted that having embarked upon a trial of the action upon conflicting affidavits, there were no more issues left to be decided and that the learned judge's finding that there were serious issues to be tried appears somewhat inane.

With the greatest of respect to learned counsel we must say that based on all evidence available before him the learned judge is more than justified in coming to the conclusion that not only that there are serious questions to be tried but also that the respondents have in fact made out a *prima facie* case for an actionable nuisance against the appellants. We may add that once it is shown that the appellants' acts constitute in law an actionable nuisance it is no defence to say that the appellants had taken

all reasonable precautions to prevent it. (See *Rapier v. London Tranways Company* [1893] 2 Cl. 588). Although (as claimed by the appellants) the piling works are of a temporary duration it does not exclude the respondent's right to an injunction if the interference is an actionable nuisance causing physical damage to the respondents' property (see *Stone v. Bolton* [1950] 1 KB 201).

On the last ground, in all the circumstances of the case and after considering the law we find that the learned judge was also right in deciding the balance of convenience and justice in favour of the respondents.

Lastly, we also find that damages could not possibly be an adequate remedy considering that the said premises is a heritage building and that the respondents should not be put to further risk of irreparable damage if the piling works were allowed to go on.

In the result we find that there is considerable justification for the learned judge to grant the orders sought for by the respondents and dismiss the appellants' application to set aside the injunction.

We are therefore unanimous that this appeal should be dismissed with costs.

My learned brothers Mokhtar Hj. Sidin and Mohd. Saari Yusoff JJCA have read this judgment in draft and expressed their agreement with it.